A DIGEST

OF

ENGLISH CIVIL LAW

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BY

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BOOK II, PART I

LAW OF CONTRACT (GENERAL)

BY

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SCHEME OF THE WORK

PREFACE

THIS instalment of the work is an attempt to state the general Law of England on the important subject of Contracts, as it stood at the close of the year 1905. That law is very modern; not much of it is older than the middle of the eighteenth century. Even when Blackstone wrote, its existence, though beginning to make itself felt, was not deemed sufficiently important to merit more than a brief notice in a work professing to deal with the whole of English Law.

The explanation of this remarkable fact will be found in the treatment of Particular Contracts, which will form the subject of Part II of the present Book, intended to be published in the autumn of this year. Part II will deal with Sale (of Goods and Land), Hiring, Loan, Deposit, Employment (including Master and Servant, Master and Apprentice, Principal and Agent, and Independent Contractor), Innkeeper and Guest, Carriers, Partnership, Principal and Surety, Insurance, and Gaming Contracts. These subjects seem to us to fall naturally under the head of Contract. To our forefathers, they presented themselves rather as social relationships regulated by law; and it was not until the great judges of the later eighteenth and early nineteenth centuries (headed by Lord Mansfield) began to generalize from the somewhat arbitrary rules affecting these relationships, that our present Law of Contract made its appearance. At the present day, these relationships, oddly

enough, are treated as exceptions from (or, at least, as peculiarities of) the general Law; and as such are here made to succeed it. Historically speaking, they are the materials out of which the general Law of Contract has been built. A striking but premature example of the process is to be found in Lord Holt's famous judgment in *Coggs v. Bernard*.

These reflections, however, interesting as they must be to any one who cares for the history of our Law, should not be allowed to obscure the practical value of this Part, as a simple and, it is believed, trustworthy statement of the general principles of our Law of Contract. Much of it is, no doubt, very elementary; but it is surprising to find how often elementary rules are forgotten. And as the Editor's share in the present instalment is a humble one, he may venture to point out that there are some parts of the Law of Contract which appear to be by no means very familiar, even to learned practitioners; and that there are few of us who would not derive benefit from a reference to Mr. Lee's careful statement of the rights of the parties arising from a breach of contract (Section V) or of the different consequences arising from the adoption of one of the various forms of co-contracting (Section VII).

The Index and Tables will add, it is hoped, to the utility of the work as a book of reference for the practitioner; and in this connection I am much indebted to my former pupil, Mr. Nevile S. Done, for the great care which he has expended on the Index, and to Mr. Coryton Day for his work on the Tables.

EDWARD JENKS.

20th January, 1906.

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FORMATION OF CONTRACT

TITLE I—OFFER AND ACCEPTANCE

Contract

182. A contract is an agreement which creates, or is intended to create, a legal obligation between the parties to it.

Void contract

183. A contract which does not create a legal obligation between the parties is termed a "void" contract.

Voidable contract

184. A contract which one or more of the parties thereto may affirm or avoid at his or their option is termed a "voidable" contract.

Unenforceable contract

185. A contract upon which an action cannot be maintained by one of the parties thereto is said to be unenforceable by that party.

Taylor v. *G. E. Ry. Co.* [1901] 1 K. B. at p. 779.

[For examples of unenforceable contracts see Book I, §§ 158–175 (Limitation of Actions) and §§ 220, 222 below (Statute of Frauds, s. 4; Sale of Goods Act 1893, s. 4). In the case of a statute-barred claim, the contract has become unenforceable by lapse of time. But it is not avoided, and may be revived without fresh consideration in accordance with Book I, §§ 160–162. The classes of contracts specified in §§ 220 and 222 (below) are unenforceable unless they are in writing, or otherwise satisfy the statutory requirements (§ 222). Nevertheless, even though the requisite evidence of their existence is wanting, they are valid contracts. They create obligations and produce most of the legal consequences of contracts, so that (e. g.) if the contract is for the sale of specific goods, the property in the goods passes to the buyer (per Bigham J., *Taylor* v. *G. E. Ry. Co.* [1901] 1 K. B., at p. 779). They may be rendered enforceable *ex post facto* by written evidence forthcoming at any time before action brought (See Addendum to Title II of this Section). Finally, neither the lapse of time nor the absence of writing is available as a defence, unless expressly raised by the pleadings.]

Non-contractual engagements

186. There is no contract if it is to be gathered from the language or acts of the parties, or from the circumstances of the case, that the parties did not intend to create a legal obligation between them.

[There is little direct authority for this proposition; but it is presumed that a purely social engagement, e. g. of two persons to dine together, does not produce legal consequences. This is sometimes expressed by the phrase, that an agreement which is to produce legal consequences must be an "act in the law." (Pollock, *Principles of Contract*, 7th ed. p. 3.)]

187. There is no contract if it is impossible to gather from the language or acts of the parties, or from the circumstances of the case, the nature and content of the obligation intended to be created. *Vague promises*

White v. *Bluett* (1853) 23 L. J. Ex. 36.
Pearce v. *Watts* (1875) L. R. 20 Eq. 492.

188. There is no contract if it is left to one of the parties to determine the character or amount of the performance due from him. *Unascertained promise*

Taylor v. *Brewer* (1813) 1 M. & S. 290.

189. A contract is concluded when one party has communicated to another an offer, and that other has accepted it, or when the parties have united in a concurrent expression of intention, designed to create a legal obligation. *Making of contract*

[Our older law-writers pay little attention to offer and acceptance as constituent elements of contract. (See, for instance, Blackstone, *Comm.* II, pp. 442 ff.) It appears that in English law there may be contracts which do not arise from the acceptance of a preceding offer. Thus, a lease is at once a conveyance and a contract. So far as it is a contract, we must look for the terms of the contract within the instrument itself; for rules of evidence preclude us in general from supplementing or varying the written contract by reference to the negotiations which preceded it. The deed is not merely evidence of the contract, but is the contract. Antecedent discussion therefore, even though it may have resulted in a contract, viz. in an agreement for a lease, is inadmissible, as regards the lease itself, to point to one party more than to the other as offeror or acceptor. In such a case, the union of minds takes the form, not of the acceptance of an offer, but of a concurrent expression of intention. (See Pollock, *Principles of Contract*, 7th ed. pp. 6–7.)]

Offer

190. The communication of an offer takes place when it is brought to the knowledge of the person to whom it is made.

Taylor v. *Laird* (1856) 25 L. J. Ex. 329.
Richardson v. *Rowntree* [1894] A. C. 217.

Mode of communication

191. Subject to special rules of law, an offer may be communicated either by words (spoken or written), or by conduct, or partly by words and partly by conduct.

Hart v. *Mills* (1846) 15 M. & W. 87.

When offer binding

192. An offer does not bind the offeror until acceptance, and may lapse or be revoked at any time before acceptance.

Offord v. *Davies* (1862) 12 C. B. N. S. 748.
Dickinson v. *Dodds* (1876) 2 Ch. D. 463.

Lapse of offer

193. An offer lapses when (*a*) the person to whom it is made fails to accept it within the time or in the manner prescribed by the offeror, or, if no time or manner is prescribed, within a time or in a manner reasonable under the circumstances, (*b*) the offeree communicates his refusal of the offer, or makes a counter-offer, (*c*) either party dies.

(*a*) *Baily's Case* (1868) L. R. 5 Eq. 428. *Ramsgate Hotel Co.* v. *Montefiore* (1866) L R. 1 Ex. 109.
(*b*) *Hyde* v. *Wrench* (1840) 3 Beav. 334.
(*c*) *Dickinson* v. *Dodds* (1876) 2 Ch. D. at p. 475 (death of offeror). *Duff's Exors' Case* (1886) 32 Ch. D. 301 (death of offeree).

Revocation of offer

194. An offer is revoked when the offeror makes known to the offeree that it is no longer open to him to accept it. An offer is deemed to be revoked when the offeror renders it impossible for himself to act or forbear in terms of his offer, and the offeree learns of this, even from a third party, before acceptance.

Dickinson v. *Dodds* (1876) 2 Ch. D. 463.
Byrne v. *Van Tienhoven* (1880) 5 C. P. D. 344.
Henthorn v. *Fraser* [1892] 2 Ch. 27.

[The second part of the above rule is rendered necessary by the decision of the Court of Appeal (James and Mellish, L. JJ. Baggallay, J. A.) in *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463. This decision has been adversely criticised, but must be accepted as a correct statement of the law until the House of Lords has an opportunity in some future case of determining whether it rightly interpreted the law.]

Offer always revocable

195. Even if an offeror prescribes a time for acceptance, he may nevertheless revoke the offer at any time before acceptance; but if he has entered into an independent contract not to do so, he will be liable for a breach of such contract.

Routledge v. *Grant* (1828) 4 Bing. 653.
Bristol Bread Co. v. *Maggs* (1890) 44 Ch. D. 616.

Acceptance

196. Acceptance takes place when the offeree expresses his acceptance of the offer in the manner prescribed by the offeror, or, in default of this, in

a manner reasonable in the circumstances; but, in the last case, subject to the provisions of § 198, acceptance is not complete until it is communicated to the offeror.

MacIver v. *Richardson* (1813) 1 M. & S. 557.
Brogden v. *Metro. Ry. Co.* (1877) L. R. 2 App. Ca. 666.
Adams v. *Lindsell* (1818) 1 B. & Ald. at p. 683.

Mode of acceptance

Subject as aforesaid, and to special rules of law, acceptance may be communicated either by words (spoken or written), or by conduct, or partly by words and partly by conduct.

Ineffectual acceptance

197. An acceptance which does not correspond with the terms of an offer is ineffectual. If the offeree purports to accept subject to conditions, additions, restrictions, or alterations, his purported acceptance counts as a refusal of the original offer and as a new offer. A purported acceptance made after an offer has lapsed or been revoked (probably) counts as a new offer.

Hyde v. *Wrench* (1840) 3 Beav. 334.
Lucas v. *James* (1849) 7 Hare, 410.

Acceptance by post

198. If acceptance through the post is expressly or by implication prescribed or permitted by the offeror, acceptance is made, and the contract is concluded, at the moment when an acceptance is duly posted for

transmission to the offeror, even though the acceptance is delayed or lost in the post.

Household Fire Insurance Co. v. *Grant* (1879) 4 Ex. D. 216.
Cowan v. *O'Connor* (1888) 20 Q. B. D. 640.
Henthorn v. *Fraser* [1892] 2 Ch. 27.
In re London & Northern Bank [1900] 1 Ch. 220.

General offer

199. When it is to be gathered from an offer, (whether made to a definite person or persons or to persons generally,) that the offeror intends to be bound to the person who acts or forbears in terms of the offer without previous communication of acceptance, the person so acting or forbearing accepts the offer, when he so acts or forbears with the knowledge of the offeror.

Williams v. *Carwardine* (1833) 4 B. & Ad. 621.
Ex p. Asiatic Banking Co. (1867) L. R. 2 Ch. App. 391.
Brogden v. *Metro. Ry. Co.* (1877) L. R. 2 App. Ca at p. 691.
Carlill v. *Carbolic Smoke Ball Co.* [1893] 1 Q. B. (C. A.) 256.

Inchoate contracts

200. If the parties to a contract have agreed that their contract is to be put into a particular form, it is a question of fact in each case whether they intend that no obligation shall arise until the contract is put into such form. The mere fact that the parties have so agreed does not prevent them from being bound, if they intended to be so, and if they are at one as regards the terms of the proposed contract.

Chinnock v. *The Marchioness of Ely* (1865) 4 D. J. & S. 638.
Rossiter v. *Miller* (1878) L. R. 3 App. Ca 1124.
Lloyd v. *Nowell* [1895] 2 Ch. 744.

TITLE II—FORM AND CONSIDERATION

Specialty and simple contracts

201. All contracts are either: —

(*a.*) in writing under seal ("specialty" contracts)

or

(*b.*) otherwise expressed ("parol" or "simple" contracts).

Rann v. *Hughes* (1778) 7 T. R. 350 n.

Promisor and promisee

202. Every contract contains a promise or promises.

The person who makes a promise is termed "the promisor."

The person to whom a promise is made is termed "the promisee."

In a contract containing reciprocal promises, each party is at the same time promisor and promisee.

[In the case of a specialty contract, the promise is termed a "covenant," and the promisor and promisee are termed "covenantor" and "covenantee" respectively. In the case of a bond, the corresponding terms are "obligor" and "obligee."]

Nudum pactum

203. No simple contract is binding upon a party to it unless he receives consideration for his promise.

Rann v. *Hughes*, *ubi sup.*
Cook v. *Oxley* (1790) 3 T. R. 650.

Valuable consideration

204. Except as hereinafter mentioned, a party to a contract is said to receive consideration for his promise when the promisee does, forbears, or suffers, or promises to do, forbear, or suffer, something in exchange for, and at the time of, the promise made to him.

Jones v. *Ashburnham* (1804) 4 East, 455.
Currie v. *Misa* (1875) L. R. 10 Ex. at p. 162.
Carlill v. *Carbolic Smoke Ball Co.* [1893] 1 Q. B., at p. 264.

[The existence of a blood or marriage relationship between the parties is often described as "good consideration." But this kind of consideration, though of importance in other branches of the law, is not recognized by the Law of Contract, which demands "valuable consideration."]

Executed and executory considerations

205. When a consideration consists in something done, forborne, or suffered, it is said to be "executed;" when a consideration consists in a promise to do, forbear, or suffer, it is said to be "executory." An executory consideration becomes executed upon performance.

[Formerly the terms "executed" and "executory" were often applied to the contract itself. This practice is to be deprecated. Every contract is, in its nature, executory. When it has been completely executed, it ceases to exist. ED.]

Past consideration

206. Subject to the rules relating to the revival of statute-barred debts, an antecedent act, forbearance, or promise, of one party is no consideration for a subsequent promise of the other party, nor is a subsequent act, forbearance, or promise of one party

any consideration for an antecedent promise of the other.

Hopkins v. *Logan* (1839) 5 M. & W. 241.
Roscorla v. *Thomas* (1842) 3 Q. B. 234.
Kaye v. *Dutton* (1844) 7 M. & Gr. 807.

[It is sometimes said that an antecedent act or forbearance may be consideration for a subsequent promise, if the antecedent act or forbearance was done or forborne at the promisor's request. (See *Hunt* v. *Bate* (1568) 3 Dyer 272 a; *Lampleigh* v. *Braithwait* (1614) Hob. 105; *Thornton* v. *Jenkyns* (1840) 1 M. & G. 166.) But *quaere* whether this is so, unless the request in substance amounts to an offer, the terms of which are repeated or ascertained in the subsequent undertaking. (*Wilkinson* v. *Oliveira* (1835) 1 Bing. N. C. 490; *Kennedy* v. *Brown* (1863) 13 C. B. N. S. 677.)]

Inadequacy of consideration

207. It is not necessary that the consideration should be of equal value with the promise in respect of which it is given.

Haigh v. *Brooks* (1839) 10 A. & E. 309.
Westlake v. *Adams* (1858) 5 C. B. N. S., at p. 265.
Bolton v. *Madden* (1873) L. R. 9 Q. B. 55.

Abandonment of claims

208. The abandonment of a right or *bonâ fide* claim, even though unfounded, or the forbearance to exercise the right or to assert the claim for a definite or reasonable time, may be a valid consideration for a promise.

Willatts v. *Kennedy* (1831) 8 Bing. 5.
Mather v. *Lord Maidstone* (1856) 18 C. B. 273.
Cook v. *Wright* (1861) 1 B. & S. 559.
Callisher v. *Bischoffsheim* (1879) L. R. 5 Q. B. 449.
Miles v. *New Zealand Alford Estate Co.* (1886) 32 Ch. D. (C. A.) 266.
[*Quaere*, if the claim abandoned is wholly unreasonable (*Thomson* v. *Eastwood* (1877) L. R. 2 App. Ca. 215) or utterly untenable (*Chapman* v. *Franklin* (1905) XXI T. L. R. 515.)]

209. What is a reasonable time within the meaning of § 208, is a question of fact in each case. *Reasonable time*

Oldershaw v. *King* (1857) 2 H. & N., at p. 524.

210. When, by reason of a general rule of law or of a subsisting obligation, one party already owes to another an act or forbearance, such act or forbearance, or the promise thereof in whole or in part, is no consideration for a promise by that other. *Nugatory considerations*

Pinnell's Case (1602) 5 Rep. 117.
Fitch v. *Sutton* (1804) 5 East, 230.
Crowhurst v. *Laverack* (1852) 8 Exch. 208.
Fraser v. *Hatton* (1857) 2 C. B. N. S. 512.

211. An act or forbearance which is contrary to law, morality, or public policy, or the promise thereof, is no consideration. *Improper considerations*

Collins v. *Blantern* (1766) 2 Wils. 341.
Nerot v. *Wallace* (1789) 3 T. R. 17.
Jones v. *Ashburnham* (1804) 4 East, 455.
Levy v. *Yates* (1838) 8 A. & E. 129.
Wells v. *Foster* (1841) 8 M. & W. 151.

212. A promise is no consideration when the thing promised is at the time of the promise either contrary to the course of nature or impossible in law. *Impossible considerations*

Harvey v. *Gibbons* (1675) 2 Lev. 161.
Thornborow v. *Whitacre* (1705) 2 Lord Raym. 1164.
Faulkner v. *Lowe* (1848) 2 Exch. 595.
Cufford v. *Watts* (1871) L. R. 5 C. P., at p. 588

Specialty contract

213. A specialty contract without consideration is valid; but, in case of breach, the promisee can only obtain damages, not specific performance or injunction.

Jefferys v. *Jefferys* (1841) Cr. & Ph. 138.
Walrond v. *Walrond* (1858) Johns. 18.
In re Lucan (1890) 45 Ch. D. 470.

Legal form

214. If a contract is required by law to be expressed in writing under seal, then, in the absence of provision to the contrary, no obligation arises unless the contract is expressed accordingly.

Lamprell v. *Billericay Union* (1849) 3 Exch. 283.
Young v. *Mayor etc. of Leamington* (1883) L. R. 8 App. Ca. 517.

Formal contract

215. A specialty contract must be wholly written or printed, or partly written and partly printed, on paper or parchment, sealed and delivered by, or by the direction of, the party executing it.

Sheppard, *Touchstone*, p. 54.

[Signing, though invariable in practice, is not essential (*ex parte Hodgkinson* (1815) 19 Ves. at p. 295). Attestation, though usual, is only essential where it is expressly required by law or by the special authority under which the deed is executed.

Wright v. *Barlow* (1815) 3 M. & S. 512.
Freshfield v. *Reed* (1842) 9 M. & W. 404.
Harben v. *Phillips* (1883) 23 Ch. D. (C. A.) 14.]

Delivery of specialty contract

216. A specialty contract is said to be delivered when the promisor (*a*) transfers possession of it to the promisee or to a third party on his behalf with the intention that it shall take effect as his act and

deed (*b*) declares such intention otherwise by sufficient words or conduct.

Sheppard, *Touchstone*, pp. 57, 58.
Xenos v. *Wickham* (1866) L. R. 2 H. L. at p. 312.

Escrow

217. A specialty contract may be delivered subject to a suspensive condition (Book I, § 110). It is then termed an "escrow."

Xenos v. *Wickham* (1866) L. R. 2 H. L. at p. 323.

Counterparts

218. If a specialty contract is to be executed by more than one party, it is sufficient if each party executes a duplicate ("counter-part").

Unilateral contracts

219. If a specialty contract is unilateral, it binds the promisor from the moment of delivery, even though the promisee is unaware of its existence; but if the promisee, upon receiving notice of its execution, repudiates it, the contract becomes void *ab initio*. A unilateral contract need not be executed by the promisee.

Butler's and Baker's Case (1591) 3 Rep. 25.
Hall v. *Palmer* (1844) 13 L. J. Ch. 352.
Fletcher v. *Fletcher* (1845) 14 L. J. Ch. 66.
Xenos v. *Wickham* (1866) L. R. 2 H. L. 296.

Requirement of writing

220. Subject to the provisions of § 221, a contract is unenforceable whereby a person (*a*) being an executor or administrator, expressly promises to answer damages out of his own estate; (*b*) ex-

pressly promises to answer for the debt, default, or miscarriage of another; (*c*) makes a promise in consideration of marriage; (*d*) promises to transfer any interest in lands tenements or hereditaments; (*e*) makes a promise the performance of which must extend, as regards both parties to it, beyond the period of one year from the making thereof; unless the contract sought to be enforced, or some memorandum or note thereof is in writing, signed by the party against whom it is sought to be enforced, or by some other person thereunto by him lawfully authorised.

Statute of Frauds (1677) s. 4.

(*b*) This clause applies only to contracts of guarantee, not to contracts of indemnity. *Birkmyr* v. *Darnell* (1705) 1 Salk. 27.

(*c*) Mutual promises of marriage do not fall within this clause. *Cork* v. *Baker* (1716) 1 Stra. 34.

(*e*) *Peter* v. *Compton* (1693) Skinn. 353.
Donellan v. *Read* (1832) 3 B. & Ad. 899.

[The fact that a contract is determinable within the year, does not prevent it falling within this clause (*Birch* v. *Liverpool* (1829) 9 B. & C. 392). A contract to serve for a year from to-morrow is not within the clause (*Smith* v. *Gold Coast L^d.* [1903] 1 K. B. 285.)]

Part performance

221. If, in the case of any such contract, (*a*) there has been part performance by the person seeking to enforce it, the acts of part performance being unequivocally referable to some such contract as that alleged; (*b*) the alleged contract is such as would, if in writing, be specifically enforceable under the equitable jurisdiction of the Court; (*c*) it would under the circumstances be fraudulent in the defendant to avail himself of the absence of writing; and

(*d*) the contract can be sufficiently proved by parol evidence; a defendant to an action for specific performance or other equitable relief may not avail himself of the absence of writing as a ground of defence.

(*a*) *Forster* v. *Hale* (1798) 3 Ves. at p. 712, per Lord Alvanley M. R.
Dale v. *Hamilton* (1846) 5 Hare, at p. 381, at p. 148, per Wigram V. C.
Caton v. *Caton* (1865) L R. 1 Ch. App. per Lord Cranworth L. C.
Maddison v. *Alderson* (1883) L. R. 8 App. Ca. 479. Cf. *Gray* v. *Smith* (1889) 43 Ch. D. 208.
(*b*) *Britain* v. *Rossiter* (1882) 11 Q. B D. 123.
McManus v. *Cooke* (1887) 35 Ch. D. 697.
Fry, *Specific Performance* (4th) p. 262.
(*c*) *Caton* v. *Caton* (1865) L. R. 1 Ch. App. 137.
Morgan v. *Milman* (1853) 3 De G M. & G. 33.

Sale of goods above £10

222. A contract for the sale of any goods of the value of £10 or upwards is not enforceable by action unless the buyer accepts part of the goods so sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party against whom it is sought to be enforced, or his agent in that behalf.

Sale of Goods Act, 1893, s. 4. subs. 1.

Meaning of "goods"

223. The provisions of the last § apply, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or that some act

may be requisite for the making or completing thereof, or rendering the same fit for delivery.

Sale of Goods Act, 1893, s. 4, subs. 2.

Acceptance of goods

224. There is an acceptance of goods within the meaning of § 222, when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there is an acceptance in performance of the contract or not.

Sale of Goods Act, 1893, s. 4, subs. 3.

Indirect enforcement

225. A contract, unenforceable by action owing to the absence of the requirements of §§ 220 and 222, may nevertheless be valid in other respects.

Leroux v. *Brown* (1852) 12 C. B. 801.
Britain v. *Rossiter* (1882) 11 Q. B. D. 123.
Maddison v. *Alderson* (1883) L. R. 8 App. Ca., at p. 474.
Taylor v. *G. E. Ry. Co.* [1901] 1 K. B, at p. 779.

Marine insurance

226. A contract of marine insurance (other than such insurance as is referred to in s. 506 of the Merchant Shipping Act, 1894,) is not valid unless it is expressed in the form of a policy.

Stamp Act, 1891, s. 93.

Addendum to Title II.

Meaning of "note or memorandum"

[In §§ 220 and 222 the words "note or memorandum in writing" include any printed or written documents, from which all the terms of the contract may be collected (a); more especially the

(a) *Wain* v. *Warlters* (1804) 5 East, 10.

parties (b), the subject matter (c), and the consideration (d) for the promise of the party sued. But, in the case of a contract to answer for the debt default or miscarriage of another, it is not required that the consideration should appear in writing (e).

(b) *Bailey* v. *Sweeting* (1861) 9 C. B. N. S. 843.
Vandenbergh v. *Spooner* (1866) L. R. 1 Ex. 316.
(c) *Shardlow* v. *Cotterell* (1881) 20 Ch. D. 90.
(d) *Wain* v. *Warlters, ubi sup.*
Saunders v. *Wakefield* (1821) 4 B. & Ald. 595.
(e) Mercantile Law Amendment Act, 1856, s. 3.

Several documents

When the contract is to be gathered from several documents, it is sufficient if the person sued has signed one document which incorporates, directly or by reference, the essential terms (f). It is not necessary that the signature should be placed at the end of the document; but it must be of such a character and so placed as to connect the signer with the whole of the contract (g). A name printed upon a document may constitute a sufficient signature for the purpose of these §§ (h).

(f) *Ridgway* v. *Wharton* (1857) 6 H. L. C. 238.
Jones v. *Victoria Graving Dock Co.* (1877) 2 Q. B. D. 314.
(g) *Johnson* v. *Dodgson* (1837) 2 M. & W. 659.
Foster v. *Mentor Life Assurance Co.* (1854) 3 E. & B. 48.
Caton v. *Caton* (1867) L. R. 2 H. L. 127.
(h) *Saunderson* v. *Jackson* (1800) 2 B. & P. 238.
Schneider v. *Norris* (1814) 2 M. & S. 286.
Tourret v. *Cripps* (1879) 48 L. J. Ch. 567.

Description of parties

It is sufficient if the parties, though not named, are so described that they can be identified easily and certainly (i). For this purpose oral evidence is admissible. The same principle applies also to the subject matter (j) and to the consideration (k). It is not necessary that the documents containing the terms of the contract should have been made for the purpose of supplying evidence of the contract, if in fact they do so (l).

(i) *Potter* v. *Duffield* (1874) L. R. 18 Eq. 4.
Commins v. *Scott* (1875) L. R. 20 Eq. 15.
Rossiter v. *Miller* (1878) L. R. 3 App. Ca. 1124.
(j) *Ogilvie* v. *Foljambe* (1817) 3 Mer. 53.
Owen v. *Thomas* (1834) 3 My. & K. 353.
Mc Murray v. *Spicer* (1868) L. R. 5 Eq. 527.
(k) *Haigh* v. *Brooks* (1839) 10 A. & E. 309.
(l) *Buxton* v. *Rust* (1872) L. R. 7 Ex. 1, and 279.

Date of writing

It is immaterial that any or all (m) of the documents produced in evidence were made after the conclusion of the contract, or even with the object of repudiating it, provided that they are of such a character as to supply evidence of its terms (n) and were made before action brought (o). Oral evidence is admissible to connect two or more documents (p), provided that it obviously appears from the documents themselves that they refer to one another (q). It seems that letter and envelope may be treated as together constituting a single document (r).

(m) *Sieveewright* v. *Archibald* (1851) 17 Q. B., at p. 114.
(n) *Bailey* v. *Sweeting* (1861) 9 C. B. N. S. 843.
(o) *Bill* v. *Bament* (1841) 9 M. & W. 36.
Lucas v. *Dixon* (1889) 22 Q. B. D. 357.
(p) *Ridgway* v. *Wharton* (1853) 3 De G. M. & G. 677.
Long v. *Millar* (1879) 4 C. P. D. 454.
Taylor v. *Smith* [1893] 2 Q. B. (C. A.) 65.
(q) *Boydell* v. *Drummond* (1809) 11 East, 142.
(r) *Pearce* v. *Gardner* [1897] 1 Q. B. 688.

SECTION II

PARTIES TO A CONTRACT

227. There must be at least two parties to every contract. *Two parties*

Faulkner v. *Lowe* (1848) 2 Exch. 595.
Grey v. *Ellison* (1856) 1 Giff. 438.

228. It is not essential that the identity of the promisee should be known to the promisor at the time of contracting; but no contract can exist except between definite persons. *Promisee unknown*

Kelsey v. *Dodd* (1881) 52 L. J. Ch. 39.
Ex parte Asiatic Banking Company (1867) L. R. 2 Ch. App. 391.

229. Subject to the law regarding the creation of trusts, and to the assignment of contracts by act of the parties and by operation of law, no person can acquire rights or incur contractual liabilities under a contract to which he is not a party. *Strangers to contract*

Price v. *Easton* (1833) 4 B & Ad. 433.
Tweddle v. *Atkinson* (1861) 1 B. & S. 393.
Eley v. *Positive Life Assur. Co.* (1876) 1 Ex. D. 88. } (rights)
Exall v. *Partridge* (1799) 8 T. R. 308.
Schmaling v. *Thomlinson* (1815) 6 Taunt. 147. } (liabilities)

Marriage settlements

230. When a settlement is made in contemplation of marriage, the children of the marriage may enforce any covenant for their benefit contained in the settlement.

Newstead v. *Searles* (1737) 1 Atk. 265.
Gale v. *Gale* (1877) 6 Ch. D. 11., 144.

[The rule appears to extend to the children of a widow by a former marriage (*Gale* v. *Gale*, *ubi sup.*). But see *A. G.* v. *Jacobs-Smith* [1895] 2 Q. B., at p. 349. It does not extend to the children of a widower (*Re Cameron & Wells* (1887) 37 Ch. D. 32).]

Right to sue

231. Subject as aforesaid (§§ 229 & 230), the parties to a contract cannot, unless authorised by statute, confer upon a third person the right of maintaining or defending an action in respect of it in his own name.

Tweddle v. *Atkinson* (1861) 1 B. & S. 393.
Gray v. *Pearson* (1870) L. R. 5 C. P. 568.

SECTION III

PERFORMANCE OF CONTRACT

TITLE I. — DUTY OF PERFORMANCE

Performance

232. The parties to a contract must, unless legally excused from performance, perform their respective duties under the contract.

Cranley v. *Hillary* (1813) 2 M. & S., at p. 122.
Haldane v. *Johnson* (1853) 8 Exch. 689.

Extent of performance

233. The character and extent of the performance due from each party are determined by the words and conduct of the parties as interpreted by reference to usage and law.

Ratt v. *Mitchell* (1815) 4 Campb. 146.
Humfrey v. *Dale* (1857) 7 E. & B. 266.
Tucker v. *Linger* (1883) L. R. 8 App. Ca. 508.
Bl. *Comm.* III, 443.
Meyer v. *Dresser* (1864) 16 C. B. N. S. 660.

Completion of performance

234. Performance must be complete, and strictly in accordance with the terms of the contract.

Bird v. *Smith* (1848) 12 Q. B. 786.
Richardson v. *Barnes* (1849) 4 Exch. 128.
Parry v. *Great Ship Co.* (1863) 4 B. & S. 556.

Conditions precedent

235. When the performance due from one party is such that it cannot be rendered without the concurrence of the other, the first-named party is deemed to have performed his duty, if he has tendered performance, and the other party has failed to accept it.

Startup v. *Macdonald* (1843) 6 M. & G., at p. 610.

This § applies to a tender of payment of a money debt, in so far as it is not inconsistent with §§ 239–245.

Jones v. *Barkley* (1781) 2 Dougl. 659.
Smith v. *Wilson* (1807) 8 East, 437.
Bankart v. *Bowers* (1866) L. R. 1 C. P. 484.

Strictness of tender

236. Such tender must be unconditional, and strictly in accordance with the terms of the contract; and the party making it must do, or be ready and willing to do, everything necessary on his part to the complete performance of the contract.

Laing v. *Meader* (1824) 1 C. & P. 257.
Foord v. *Noll* (1842) 2 Dowl. N. S. 614.

Mode of tender

237. A tender must be made at such time and in such manner as to give the person to whom it is made a reasonable opportunity of ascertaining whether it is made in accordance with the contract.

Isherwood v. *Whitmore* (1843) 11 M. & W. 347.

Concurrence of third party

238. When performance depends upon the concurrence of a third person, it is no excuse for non-performance (in the absence of agreement to that effect between the parties) that the third person declines to concur.

Grey v. *Hesketh* (1755) Ambl. 268.
Worsley v. *Wood* (1796) 6 T. R. 710.
Perkins, *Profitable Book*, s. 756.

Tenders of money

239. In the case of a money-debt, tender without payment does not discharge the debtor; but tender of payment duly made, and followed by a continued readiness to pay, will, if the amount of the debt is paid into Court, be a good defence to an action for non-payment.

Dixon v. *Clarke* (1848) 5 C. B, at p. 377.
Kinnaird v. *Trollope* (1889) 42 Ch. D. 610.

Production of money

240. A tender of payment is not valid unless the money is actually produced, or the creditor expressly or by implication dispenses with production.

Douglas v. *Patrick* (1790) 3 T. R. 683.
Finch v. *Brook* (1834) 1 Scott, at p. 76.

Medium of tender

241. Tender of payment must be made in current coin of the United Kingdom, Bank of England Notes, or in other medium authorised by law.

Polglass v. *Oliver* (1831) 2 Cr. & J. 15.

[Bank of England Notes are legal tender for any sum above five pounds, except by the Bank itself. (Bank of England Act, 1833, s. 6.)

By the Coinage Act, 1870, s. 4, gold coins are legal tender to any amount, silver coins up to forty shillings, bronze coins up to one shilling.

By s. 11 of the same Act, the Crown in Council is empowered to direct that coins coined in any foreign country shall be a legal tender, to direct the establishment of a branch of the Mint in any British possession, and to determine the extent to which coins issued therefrom are to be legal tender.

A tender in country bank-notes, or by a cheque on a banker, is good, if the creditor objects only to the amount and not to the quality of the tender. (*Polglass* v. *Oliver* (1831) 2 Cr. & J. 15; *Jones* v. *Arthur* (1840) 8 Dowl. 442).]

Change

242. If a debtor tenders a greater sum than is due, this is a good tender of the amount due; but the debtor may not demand change, and the creditor is not bound to give it.

Wade's Case (1600) 5 Rep. 115 a.
Douglas v. *Patrick* (1700) 3 T. R. 683.
Betterbee v. *Davis* (1811) 3 Campb. 70.
Robinson v. *Cook* (1815) 6 Taunt. 336.

Interest

243. A tender must include all interest, if any, due upon the debt. A tender duly made prevents the accrual of future interest.

Norton v. *Ellam* (1837) 2 M. & W., at p. 463.
Kinnaird v. *Trollope* (1889) 42 Ch. D. 610.
Bank of N. S. Wales v. *O'Connor* (1889) L. R. 14 App. Ca. p. 284.

Refusal of tender

244. A creditor who refuses a tender of payment on a specified ground, cannot afterwards justify his

refusal by alleging an objection which he did not put forward at the time of refusal.

Black v. *Smith* (1791) Peake, 88.
Richardson v. *Jackson* (1841) 8 M. & W. 298.

Conditional tender

245. An offer to pay a debt upon condition of the creditor giving a receipt, is not a good tender; but a mere request for a receipt is not a condition.

Jones v. *Arthur* (1840) 8 Dowl. 442.
Richardson v. *Jackson* (1841) 8 M. & W. 298.

[A person refusing to give a receipt duly stamped, upon payment of a debt amounting to two pounds or upwards, is liable to a fine of ten pounds. (Stamp Act, 1891, s. 103.)]

Set-off

246. A debtor cannot, in the absence of agreement, apply a set-off in reduction of his debt, and tender the residue; but he may avail himself of such set-off by way of plea or counter-claim in an action by the creditor.

Searles v. *Sadgrave* (1855) 5 E. & B. 639.
Phillpotts v. *Clifton* (1861) 10 W. R. 135.

Foreign currency

247. When action is brought in England to recover a sum of money expressed to be payable in a foreign currency, the amount recoverable is an equivalent sum in English currency, calculated according to the rate of exchange at the date when payment fell due,

or, in the case of an action upon a foreign judgment, at the date of the judgment sued upon.

Scott v. *Bevan* (1831) 2 B. & Ad. 78.
Manners v. *Pearson* [1898] 1 Ch. 581.

Alternative performances

248. If one of two alternative performances is due, the person who is to perform has the right (in the absence of agreement to the contrary), to elect either alternative. Election, once made, is irrevocable.

Co Litt., 146 a.
Layton v. *Pearce* (1778) 1 Dougl. 15.
Brown v. *Royal Ins. Co.* (1859) 1 E. & E. 853.

Performance by agent

249. Unless a contrary intention appears from the language of the parties, or the nature of the transaction, a debtor may perform his part by a servant or agent. Such a contrary intention is presumed, in the case of any duty involving personal confidence between the parties, or the exercise of the debtor's personal skill.

British Waggon Co. v. *Lea* (1880) 5 Q. B. D. 149.

Liability of representatives

250. Subject to the provisions of § 249, the duty of performance devolves upon the representatives of a deceased debtor. Any defences available to the debtor are equally available to the debtor's representatives.

Pinchon's Case (1612) 9 Rep. 86 b.
Wills v. *Murray* (1850) 4 Exch., at p. 865.
Finlay v. *Chirney* (1888) 20 Q. B. D. 494.

Enforcement by representatives

251. Unless a contrary intention appears from the language of the parties, or the nature of the transaction, the right to claim performance devolves upon the representatives of a deceased creditor. Such a contrary intention is presumed in the case of any duty involving personal confidence between the parties.

Wills v. *Murray*, *ubi sup.*

Place of performance

252. If the place of performance is fixed by the contract, performance must be rendered at that place.

Sheppard, *Touchstone*, p. 136.

Creditor's abode

253. If no place of performance is fixed by the contract, the debtor is bound (subject to the provisions of § 254) to find the creditor, and make or tender him performance, provided the creditor is within the jurisdiction. If the creditor, by being outside the jurisdiction, prevents performance being duly made or tendered, the debtor is excused.

Sheppard, *Touchstone*, pp. 136, 378. Co. Litt. 210 b.
Haldane v. *Johnson* (1853) 8 Exch., at p. 695.
Fessard v. *Mugnier* (1865) 18 C. B. N. S. 286.

Delivery of goods

254. Under a contract to deliver goods without any place being expressly or by implication appointed for delivery, the promisor may require the promisee to appoint a proper place and mode of delivery, and will be discharged if he delivers accordingly.

Co. Litt. 210 b; Sheppard, *Touchstone*, p. 379.
Perkins, *Profitable Book*, s. 785.

[If delivery is to be made in pursuance of a contract of sale, the provisions of the Sale of Goods Act, 1893, s. 29 (1) apply. (See Part II of this Book.)]

Time of performance

255. When a time is fixed, at or within which performance is to take place, performance or tender must take place at or within the time agreed.

Poole v. *Tunbridge* (1837) 2 M. & W. 223.
Sheppard, *Touchstone*, p. 378.

[As to the effect of non-performance at or within the time agreed, see Book I §§ 115, 116.]

Reasonable time

256. When no time is fixed for performance, performance must take place within a reasonable time, reference being had to the nature of the contract and the circumstances of the case. What is a reasonable time is a question of fact in each case.

Hick v. *Raymond* [1893] A. C. 22.
Carlton Co. v. *Castle Mail Co.* [1898] A. C. 486.
Sale of Goods Act, 1893, s. 29 (2).

257. Demand or tender of delivery of goods must be made at a reasonable hour. What is a reasonable hour is a question of fact in each case. *Demand or tender of goods*

Startup v. *Macdonald* (1843) 6 M. & G. 593.
Sale of Goods Act, 1893, s. 29 (4).

258. When time is of the essence of the contract (Book I, § 115), an extension of the time of performance by request or agreement only substitutes, in the absence of expression to the contrary, the extended time for the time originally fixed, without further waiving the condition. *Extension of time*

Barclay v. *Messenger* (1874) 43 L. J. Ch. 449.

259. When a debtor, owing several distinct debts to one person, makes him a payment, either with express intimation or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly. *Appropriation of payment by debtor*

Clayton's Case (1816) 1 Mer. 572.
Simson v. *Ingham* (1823) 2 B. & C., at p. 72.
Nash v. *Hodgson* (1855) 6 De G. M. & G., at p. 487.

260. When the debtor has omitted to indicate, and there are no other circumstances indicating, to which debt the payment is to be applied, the creditor may, at any time before action brought, apply it *Appropriation of payment by creditor*

at his option to any lawful debt actually due and payable to him from the debtor, even though barred by the law relating to the limitation of actions, or otherwise unenforceable.

Clayton's Case (1816) 1 Mer. 572.
The Mecca [1897] A. C. 286.
Wright v. *Laing* (1824) 3 B. & C. 165.
Mills v. *Fowkes* (1839) 5 Bing. N. C. 455.
Mayfield v. *Wadsley* (1824) 3 B. & C. 362 (per Abbot C. J.)
Philpott v. *Jones* (1834) 2 A. & E. 41.

Unappropriated payments

261. When neither party makes any appropriation, the payment is applied by law in discharge of the debts in order of date. If the debts are of even date, the payment is applied in discharge of each proportionately.

Clayton's Case, ubi sup.
Favenc v. *Bennett* (1809) 11 East, 36.

[*Quære* whether, in such a case, the payment is ever applied by law in discharge of statute-barred debts, or debts otherwise unenforceable. (See *Mills* v. *Fowkes*, *ubi sup.*)]

Account current

262. Where there is a single account current between the parties, or separate accounts treated as one entire account, payments not otherwise appropriated at the time are presumed, in the absence of evidence to the contrary, to be made in discharge of the earlier items of the account.

Clayton's Case (1816) 1 Mer., at p. 608.
Field v. *Carr* (1828) 5 Bing., at p. 15.
City Discount v. *McLean* (1874) L. R. 9 C. P. 692.
The Mecca [1897] A. C. 286.

263. The duty of performance may be made conditional upon an antecedent request or demand; but, unless a contrary intention appears from the language of the parties or the nature of the contract, no request or demand of performance is necessary, and action may be brought immediately that performance falls due. *Request for performance*

Birks v. *Trippett* (1666) 1 Wms. Saund. 33.
Walton v. *Mascall* (1844) 13 M. & W., at p. 458.
Norton v. *Ellam* (1837) 2 M. & W. 464.

264. When the duty of performance is conditional upon the happening of some event, the debtor is not entitled to notice of the event unless either (*a*) he has stipulated for notice; or (*b*) the event lies within the peculiar knowledge of the creditor. *Conditional performances*

Vyse v. *Wakefield* (1840) 6 M. & W., at p. 452.
Makin v. *Watkinson* (1871) L. R. 6 Ex. 25.

265. Unless the law specially provides otherwise, or there is an express or implied agreement for interest in the contract, a debtor is not liable to pay simple or compound interest on his debt [a]. A contract to pay simple [b] or compound [c] interest may be inferred from the course of dealing between the parties, or from the custom or usage of a trade or business. *Interest*

(a) *de Bernales* v. *Fuller* (1810) 2 Campb. 426.
Page v. *Newman* (1829) 9 B. & C. 378.
(b) *Calton* v. *Bragg* (1812) 15 East, 223.
Bruce v. *Hunter* (1813) 3 Campb. 467.
Eaton v. *Bell* (1821) 5 B. & Ald. 34.
(c) *Moore* v. *Voughton* (1816) 1 Stark. 487.
Fergusson v. *Fyffe* (1841) 8 Cl & F., at p. 140.

[See Addendum at the end of this Title.]

Accrues from day to day

266. Interest under a contract is deemed to accrue from day to day, though agreed to be paid at fixed intervals, and is apportionable between persons successively entitled to the principal fund.

Banner v. *Lowe* (1806) 13 Ves. 135.
Ex p. Smyth (1818) 1 Swanst. 349.
Apportionment Act, 1870, s. 2.

Separable from principal

267. Interest under a contract may be recovered by action, with or without the principal debt (a). When the claim for the principal debt is barred, the claim for interest is barred with it (b).

(a) *Hudson* v. *Fawcett* (1844) 7 M. & G. 348.
Nordenstrom v. *Pitt* (1845) 13 M. & W. 723.
(b) *Hollis* v. *Palmer* (1836) 2 Bing. N. C., at p. 717.

Rate

268. The parties to a contract may agree upon any rate of interest which they think proper; but, in the case of loans by money-lenders, the provisions of the Money-lenders Act, 1900, apply.

Usury Laws Repeal Act, 1854.

Interest as damages

269. When an action is brought to recover an ascertained sum, the jury, or the court when acting as a jury, may at discretion allow interest as damages at a rate not exceeding the current rate of interest: —

(*a*) if the debt is payable by virtue of a written instrument at a certain time, from such time;

(*b*) if the debt is payable otherwise, from the time when demand of payment shall have been made in writing.

Such demand must give notice to the debtor that interest will be claimed from the date of demand until the time of payment.

Re State Fire Insce. Co. (1864) 2 H. & M. 722.
Ex parte Lintott (1867) L. R. 4 Eq. 188.
Civil Procedure Act, 1833, s. 28.
Re Lloyd Edwards (1892) 61 L. J. Ch. 22.

Interest on judgments

270. Every judgment carries interest at the rate of four pounds per centum per annum from the time of entering up the judgment until the same is satisfied; and such interest may be levied under a writ of execution on such judgment.

Judgments Act, 1838, s. 17.
R. S. C., 1875, O. XLII. r. 16.

[This § does not apply to County Court judgments, unless and until they are removed into the High Court. (*Reg.* v. *Essex C. C.* (1887) 18 Q. B. D. 704).]

ADDENDUM TO TITLE I.

The following cases in which the law allows interest may be noted.

1. *Bills of Exchange and Promissory Notes.* By the Law Merchant and by statute (Bills of Exchange Act, 1882, s. 57 (1)) these carry interest without express agreement. In the absence of express agreement for interest, interest runs only "from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case" (Bills of Exchange Act, 1882, s. 57 (1) (b)). But "where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof" (ibid. s. 9 (3)). In this case, the agreed interest is recoverable until the maturity of the bill or note, as part of the debt, and not as damages (*Florence* v. *Jenings* (1857) 2 C. B. N. S. 454). After maturity, interest is in each case recoverable as damages only. "Such interest may, if justice require it, be withheld wholly or in part; and, where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper" (Bills of Exchange Act, 1882, s. 57 (3)) ("Bill" includes "note" (s. 89)). The rate, if any, expressed in the instrument is presumptively the measure of damages (*Keene* v. *Keene* (1857) 3 C. B. N. S. 144).

2. *Contracts to pay a debt by bill or note.* Interest is recoverable in the same manner as if the bill or note had been duly given (*Lowndes* v. *Collens* (1810) 17 Ves. 27) *Sutton* v. *Morgan* (1814) 5 Taunt. 758.

3. A sum due on an *account stated* in respect of money lent carries interest from the date of the statement (*Blaney* v. *Hendricks* (1771) 2 W. Bl. 761. But see the remarks of Lord Ellenborough, C. J., in *Calton* v. *Bragg* (1812) 15 East, 223).

4. *A surety* who, owing to the default of his principal, is compelled to pay a sum of money, is entitled to recover from the principal interest on the sum so paid, from the date of payment (*Petre* v. *Duncombe* (1851) 20 L. J. Q. B. 242).

5. *A bond* with a penalty conditioned for the payment of money carries interest, in the absence of provision to the contrary, from the time of the obligor's default (4 & 5 Anne c. 16, s. 13). A single bond does not carry interest (*Hogan* v. *Page* (1798) 1 B. & P. 337).

6. *Contracts for sale of land.* Interest is payable upon the purchase-money from the time fixed for completion of the purchase, or from the time of the vendor making a good title, whichever is the latest, unless the purchaser is entitled to take possession before completion, when he will be liable to pay interest from that time (*Esdaile* v. *Stephenson* (1822) 1 Sim. & S. 122, followed in *Jones* v. *Mudd* (1827) 4 Russ. 118), provided that a good title has then been made. Interest is also payable upon the lien for the return of a deposit or of purchase-money which arises upon a rescission of the contract of sale (*Whitbread* v. *Watt* [1901] 1 Ch. 911, affirmed [1902] 1 Ch. 835), and on the vendor's lien for unpaid purchase-money (*Re Stucley* (1905) XXII T. L. R. 33).

The mercantile rate of interest is usually 5 per cent; the equitable rate varies from 3 to 5 per cent, according to the circumstances. (See *Re Barclay* [1899] 1 Ch. 674.)

TITLE II — CONSEQUENCES OF NON-PERFORMANCE

Breach of contract

271. When a party to a contract, from whom performance is due, without lawful excuse fails to perform his promise, the contract is broken.

Anticipatory breach

272. When a party to a contract from whom performance is not yet due, absolutely and unequivocally (*a*) expresses an intention not to perform, (*b*) disables himself from performing, his promise, the other party may at his option treat the contract as broken; and the contract is thereupon determined.

(*a*) *Hochster* v. *Delatour* (1853) 2 E. & B 678.
Frost v. *Knight* (1872) L R. 7 Ex. 114.
Johnstone v. *Milling* (1886) 16 Q. B. D. (C. A.) 460.
(*b*) *Lovelock* v. *Franklyn* (1846) 8 Q. B. 371
Synge v. *Synge* [1894] 1 Q. B. 466.
Mersey Steel & Iron Co v. *Naylor* (1884) L. R. 9 App. Ca. 434.

[But (*semble*) if a party temporarily disables himself from performing an act due at a fixed future date, there is no breach. (*Lovelock* v. *Franklyn*, *ubi sup.*, per Lord Denman, C. J., at p. 378.)]

Damages

273. Every breach of contract gives rise to an action for damages; but, in the case of a breach of promise to pay a fixed sum of money, no damages

are recoverable other than the sum itself, and interest if any.

Marzetti v. *Williams* (1830) 1 B. & Ad. 415.
Godefroy v. *Jay* (1831) 7 Bing. 413.
Wallis v. *Smith* (1882) 21 Ch. D. 243, *per* Jessel, M. R.

Measure of damages

274. When a contract is broken, the injured party is entitled, subject to the provisions of § 276, to receive such a sum of money by way of damages as will, so far as possible, put him in the same position as if the contract had been performed.

Robinson v. *Harman* (1848) 1 Ex. 855.
Lock v. *Furze* (1866) L. R. 1 C. P., at p. 451.

[Contracts for the sale and purchase of real estate which go off because the vendor fails to make a title, are an exception. The purchaser may, in the absence of agreement to the contrary, recover the amount of the deposit he has paid, together with interest, and the expenses of investigating the title, if any; he cannot obtain compensation in damages for the loss of his bargain.

Flureau v. *Thornhill* (1776) 2 W. Bl. 1078.
Lock v. *Furze, ubi sup.*
Ramsden v. *Dyson* (1866) L. R. 1 H. L. 129.
Bain v. *Fothergill* (1874) L. R. 7 H. L. 158.

The reason is the notorious uncertainty of titles to real estate. (See Lord Hatherley's judgment in the last named case.)]

Anticipatory damages

275. When the breach is of the kind described in § 272, and action is brought before performance is due, the plaintiff is entitled to such damages as would have arisen from the non-performance of the contract at the appointed time. In calculating such damages, regard must be paid to any circumstances

which may have afforded him the means of mitigating his loss. (See § 282)

Frost v. *Knight* (1872) L. R. 7 Ex. 111.
Michael v. *Hart* [1902] 1 K. B. 482.

The remoteness of damage

276. Damages are not recoverable in respect of loss following breach of contract, unless the loss was (*a*) the natural and direct consequence of the breach, or (*b*) within the contemplation of both parties at the time of making the contract as the probable result of a breach.

Hadley v. *Baxendale* (1854) 9 Exch. 341.
Gee v. *Lancs. & York. Ry. Co.* (1860) 6 H. & N., at p. 220.
Simpson v. *L. & N. W. Ry. Co.* (1876) 1 Q. B. D. 274.
Lepla v. *Rogers* [1893] 1 Q. B. 31.
Agius v. *G. W. Colliery Co.* [1899] 1 Q. B. 312.

The decision of this question is matter of law.

Hobbs v. *L. & S. W. Ry. Co.* (1875) L. R. 10 Q. B., at p. 122.

[Where the bailee of an article deals with it in a manner inconsistent with the terms of the bailment, and damage follows, such damage is deemed to be the natural and direct consequence of the breach of contract. (*Lilley* v. *Doubleday* (1881) 7 Q. B. D. 510.)]

Mental distress

277. Damages are not recoverable in respect of disappointment of mind or injured feelings, except in the case of a breach of contract to marry.

Hamlin v. *G. N. Ry. Co.* (1856) 1 H. & N. 408.
Hobbs v. *L. & S. W. Ry. Co.*, *ubi sup.*, at p. 122.
Smith v. *Woodfine* (1857) 1 C. B. N. S. 669.
Frost v. *Knight* (1872) L. R. 7 Ex. 111.

278. Personal trouble and inconvenience to the plaintiff may be taken into account in assessing damages. *Inconvenience*

Hobbs v. *L. & S. W. Ry. Co., ubi sup.*
Phillips v. *L. & S. W. Ry. Co.* (1879) 5 C. P. D. 280.

279. Damages may be claimed for the probable prospective consequences of a breach of contract, as well as for loss in fact accrued at the time of action; but not in respect of anticipated future breaches. *Prospective damages*

Richardson v. *Mellish* (1824) 2 Bing. 229.
Lloyd v. *Dimminack* (1877) 7 Ch. D. 398.

280. When damages have been assessed in an action, further compensation cannot be claimed for subsequent loss arising from the same breach. *Subsequent loss*

Gibbs v. *Cruickshank* (1873) L. R. 8 C. P. 454.
Phillips v. *L. & S. W. Ry. Co.* (1879) 5 Q. B. D., at p. 87.

281. When a party to a contract is in default, the injured party may in any reasonable manner make good the breach, and recover as part of his damages the expenses reasonably incurred in doing so. *Making good breach*

Hamlin v. *G. N. Ry. Co.* (1856) 1 H. & N. 408.
Prehn v. *Royal Bank of Liverpool* (1870) L. R. 5 Ex. 92.
Le Blanche v. *L. & N. W. Ry. Co.* (1876) 1 C. P. D., at p. 31.
Ex parte Bank of Brazil [1893] 2 Ch. 438.

Mitigating loss

282. A party to a contract is bound to take all reasonable means of mitigating the loss consequent upon a breach by the other party. If he neglects to do so, he cannot recover any part of the damages which he might have avoided by taking such means.

Frost v. *Knight* (1872) L R. 7 Ex., at p. 115.
Dunkirk Colliery Co. v. *Lever* (1878) 9 Ch. D., at p. 25.

Mitigation of damages

283. In an action for damages for breach of contract, the defendant may prove in mitigation of damages any breaches on the part of plaintiff existing at the time of action brought.

Street v. *Blay* (1831) 2 B. & Ad. 456.
Allen v. *Cameron* (1833) 1 Cr. & M. 840.
Oldershaw v. *Holt* (1840) 12 A. & E. 590.
Mondel v. *Steel* (1841) 8 M. & W. 858.
Sale of Goods Act, 1893, s. 53.
Bartlett v. *Holmes* (1853) 13 C. B., at p. 638.

Nominal damages

284. In an action for breach of contract, if the plaintiff proves the breach, but fails to prove any appreciable damage in fact, he will be entitled only to nominal damages. In such a case, the Court will sometimes order the plaintiff to pay the defendant's costs.

Marzetti v. *Williams* (1830) 1 B. & Ad. 415.
Harris v. *Petherick* (1879) 4 Q. B. D. 611.

Court and jury

285. When a case is tried by a judge and jury, damages are assessed by the jury, subject to the direction of the Court in matters of law.

Gibbs v. *Fremont* (1853) 9 Exch., at p. 32.
Hobbs v. *L. & S. W. Ry. Co.* (1875) L. R. 10 Q. B., at p. 122.

Specific performance

286. A breach of contract may entitle the injured party to obtain from the Court a decree for specific performance; but this remedy will only be granted in cases in which damages would not be sufficient compensation.

Nutbrown v. *Thornton* (1804) 10 Ves. 161.
Ryan v. *Mutual Tontine Association* [1893] 1 Ch. (C. A.) at p. 126.

Contracts specifically enforceable

287. Contracts to create or transfer interests in land, and marriage articles, are specifically enforceable, provided that they satisfy the requirements of §§ 220–221.

Adderley v. *Dixon* (1824) 1 S. & S. 607.
Caton v. *Caton* (1867) L. R. 2 H. L. 127.

Contracts not specifically enforceable

288. The Court will not, in the absence of special circumstances, decree specific performance of a contract relating to movables; but in any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods upon payment of damages.

Buxton v. *Lister* (1746) 3 Atk. 383.
Adderley v. *Dixon*, *ubi sup.*
Sale of Goods Act, 1893, s. 52.

Discretion of Court

289. It lies in the judicial discretion of the Court to grant or refuse the remedy of specific performance;

Ryan v. *Mutual Tontine Association* [1893] 1 Ch. (C. A.), at p. 126.

and, in particular, specific performance may be refused on the ground of:

(a) Mistake, involving substantial hardship to the defendant;

Manser v. *Back* (1848) 6 Ha., at p. 449.
Wood v. *Scarth* (1855) 2 K. & J. 33.
Tamplin v. *James* (1880) 15 Ch. D. 216.
Preston v. *Luck* (1884) 27 Ch. D., at p. 506.
Stewart v. *Kennedy* (1890) L. R. 15 App. Ca. 108.

(b) Fraud;

Higgins v. *Samels* (1862) 2 J. & H. 460.
Mullens v. *Miller* (1882) 22 Ch. D. 194.

(c) Misrepresentation;

Lamare v. *Dixon* (1873) L. R. 6 H. L. 414.
Redgrave v. *Hurd* (1881) 20 Ch. D. 1.

(d) Concealment of facts which it was the duty of the plaintiff to disclose;

Shirley v. *Stratton* (1785) 1 Bro. Ch. 440.
Fothergill v. *Phillips* (1871) L. R. 6 Ch. App. 770.

(e) Delay or failure by the plaintiff in performing his part, or delay in claiming relief;

Milward v. *Earl of Thanet* (1801) 5 Ves. 720 n.
Clarke v. *Hart* (1858) 6 H. L. C., at pp. 635–6.
Mills v. *Haywood* (1877) 6 Ch. D. 196.
Howe v. *Smith* (1884) 27 Ch. D., at p. 92.
Cornwall v. *Henson* [1900] 2 Ch. (C. A.) 298.

(f) Any other circumstances rendering it inequitable or improper to grant this relief.

Buxton v. *Lister* (1746) 3 Atk., at p. 386.
Webster v. *Cecil* (1861) 30 Beav. 62.
Hope v. *Walter* [1900] 1 Ch. 257.

Contracts for personal service

290. The Court will not decree specific performance of a contract for personal service, or of any contract which it would be impracticable or inexpedient for the Court to enforce specifically.

Rayner v. *Stone* (1762) 2 Eden, 128.
Moseley v. *Virgin* (1796) 3 Ves. 184.
Wolverhampton Ry. Co. v. *L. & N. W. Ry. Co.* (1873) L. R. 16 Eq. 439.
Rigby v. *Connol* (1880) 14 Ch. D., at p. 487, per Jessel, M. R.
Baird v. *Wells* (1890) 44 Ch. D. 661.

[As a general rule, contracts to build fall within this clause; but where a person has contracted to build on a piece of land according to certain detailed plans, and has obtained a conveyance or lease of the land on the terms that he will do so, a decree of specific performance will be granted, if the remedy in damages would not be adequate. (*Wolverhampton Corpn.* v. *Emmons* [1901] 1 Q. B. 515; *Molyneux* v. *Richard* [1905] W. N. 164.)

And the same rule applies where a railway company has acquired land in consideration of undertaking to execute specific works upon it (*Jersey* v. *G. W. Ry. Co.* [1894] 3 Ch. 625, n).]

Gratuitous contracts

291. The Court will not specifically enforce gratuitous promises, though under seal, nor contracts determinable at the will of either party.

In re Lucan (1890) 45 Ch. D. 470.
Hercy v. *Birch* (1804) 9 Ves. 357.

Infants

292. An infant cannot obtain a decree of specific performance of a contract entered into by him.

Flight v. *Bolland* (1828) 4 Russ. 298.

[This is because the infant cannot himself be made to perform his contracts.]

Injunction

293. When the parties contract (expressly or by implication) that a certain thing shall not be done, breach of such a contract may be prohibited by injunction, although the contract itself is not capable of being specifically enforced.

Lumley v. *Wagner* (1852) 1 De G. M. & G. 604.
Whitwood Chemical Co. v. *Hardman* [1891] 2 Ch. (C. A.) 416.
Holford v. *Acton Urban District Council* [1898] 2 Ch. 240.

[A contract in form positive may, if it is in effect negative, be enforced by the remedy of injunction, unless, perhaps, it is a contract of personal service. (*Catt* v. *Tourle* (1869) L. R. 4 Ch. App. 654; *Whitwood Chemical Co.* v. *Hardman*, *ubi sup.*)]

TITLE III—IMPOSSIBILITY OF PERFORMANCE

294. A contract is void if the performance of it is either contrary to the course of nature or, by reason of facts known to both parties, impossible in law. *Impossibility in nature or law*

Clifford v. *Watts* (1871) L. R. 5 C. P., at p. 588.
Harvey v. *Gibbons* (1675) 2 Lev. 161.

[Apparently, when the facts causing the impossibility in law are known to one party only, that party cannot sue upon the contract; but the other party can sue. (*Wild* v. *Harris* (1849) 7 C. B. 999; *Millward* v. *Littlewood* (1850) 20 L. J. Ex. 2.)]

295. Impossibility arising from law other than English law, counts as impossibility of fact. *Foreign law*

Barker v. *Hodgson* (1814) 3 M. & S. 267.
Jacobs v. *Credit Lyonnais* (1884) 12 Q. B D. 589.

296. A contract, performance of which is, at the time of concluding it, impossible in fact, is not void; unless the parties contracted conditionally upon performance being possible in fact. But (probably) no action can be brought upon it by a party who, at the time of concluding it, knew of the impossibility. *Impossibility in fact*

Marquis of Bute v. *Thompson* (1844) 13 M. & W. 487.
Hills v. *Sughrue* (1846) 15 M. & W. 233.
Clifford v. *Watts* (1871) L. R. 5 C. P. 577.
Sale of Goods Act, 1893 s. 6.
Cunningham v. *Dunn* (1878) 3 C. P. D. 443.

Supervening impossibility

297. A contract for a performance which, at the time of concluding the contract, is possible in law and in fact, but which afterwards becomes impossible without default of either party, remains valid;

Paradine v. *Jane* (1647) Aleyn 26.
Brown v. *Royal Insurance Co.* (1859) 1 E. & E., at p. 859.
Arthur v. *Wynne* (1880) 14 Ch. D. 603.
Nickoll v. *Ashton, Edridge and Co.* [1901] 2 K. B. (C. A.) 126.
Krell v. *Henry* [1903] 2 K. B. (C. A.), at p. 748.

unless: —

(a) the subsequent impossibility is due to an alteration in the law;

Baily v. *de Crespigny* (1869) L. R. 4 Q. B. 180.

(b) the parties intended that in the event of impossibility of performance the contract should cease to be binding.

Such an intention is presumed:

(1) when the possibility of performance was known by the parties to depend upon the continued existence of some thing, condition, or state of things, which has ceased to exist;

Taylor v. *Caldwell* (1863) 3 B. & S. 826.
Appleby v. *Myers* (1867) L. R. 2 C. P. 651.
Boast v. *Firth* (1868) L. R. 4 C. P. 1.
Krell v. *Henry, ubi sup.*
Sale of Goods Act, 1893, s. 7.

(2) when the agreement relates to personal services to be rendered by one of the parties, and performance becomes impossible by reason of the death or illness of that party.

Farrow v. *Wilson* (1869) L. R. 4 C. P. 744.
Robinson v. *Davison* (1871) L. R. 6 Ex. 269.

[In the event of illness, the party disabled must give to the other party the earliest notice of the disablement that is reasonably practical. If he omits to do so, the other party is entitled to recover such damages as are directly referable to the omission. *Robinson* v. *Davison*, *ubi sup.*)]

One alternative impossible at making

298. When either of two alternatives is to be performed at the promisor's option, and one of them is at the time of concluding the contract impossible in law or in fact, the promisor is bound to perform the one which is possible.

Da Costa v. *Davis* (1798) 1 B. & P. 242.
Stevens v. *Webb* (1835) 7 C. & P., at p. 62.

One alternative becoming impossible

299. When either of two alternatives is to be performed at the promisor's option, and one of them becomes impossible after the conclusion of the contract, but before the option has been exercised, it is a question of construction in each case whether, according to the true intention of the parties, the promisor must perform the alternative which remains possible, or is altogether discharged.

Barkworth v. *Young* (1856) 4 Drew., at p. 25.

Choice impossible

300. When either of two alternatives is to be performed at the promisor's or the promisee's option, and the promisor or the promisee chooses an alternative which afterwards becomes impossible, the promisor is in the same position as if he had originally

contracted to do the act, which he or the promisee has elected.

Brown v. *Royal Insurance Co.* (1859) 1 E. & E. 853.

Partial impossibility

301. When the performance of a contract is or becomes in part possible and in part impossible, it is a question of intention, depending on usage and construction in each case, whether the partial impossibility avoids or discharges the contract, and whether performance by one party of the possible part entitles him or his representatives to claim any and if any how much counter-performance from the other.

Menetone v. *Athawes* (1764) 3 Burr. 1592.
Cutter v. *Powell* (1795) 6 T. R. 320.
Gillett v. *Maxwman* (1808) 1 Taunt. 140.
Appleby v. *Myres* (1867) L. R. 2 C. P. 651.
Geipel v. *Smith* (1872) L. R. 7 Q. B. 404.
The Teutonia (1872) L. R. 4 P. C. 171.

Rights previously acquired

302. The dissolution of a contract by subsequent impossibility does not affect any specific right already acquired under it by either of the parties.

Taylor v. *Caldwell* (1863) 3 B. & S. 826.
Whincup v. *Hughes* (1871) L. R. 6 C. P. 78.
Anglo-Egyptian Co. v. *Rennie* (1875) L. R. 10 C. P. 271.
Krell v. *Henry* [1903] 2 K. B. 740.
Chandler v. *Webster* [1904] 1 K. B. (C. A.) 493.

[In *Elliott* v. *Crutchley* [1904] 1 K. B. 565 (subsequently affirmed by the H. of Lords), there was an express stipulation, which took the case out of the general rule.]

Inability to perform

303. In the absence of agreement express or implied to the contrary, mere inability to perform a

promise is not impossibility within the meaning of this Title.

Thornborow v. *Whitacre* (1706) 2 Lord Raym. 1164, per Holt, C. J.

[For the effect of impossibility in relation to a condition of a bond, see Book I § 114.]

TITLE IV — RECIPROCAL PROMISES

Independent promises

304. When a contract consists of reciprocal promises, and the promise of either party is, according to the true construction of the contract, a mere independent agreement (Book I § 111), the other party is entitled to performance, whether he has himself performed his own promise or not.

Ware v. *Chappell* (1649) Style, 186.
Kingston v. *Preston* (1773) (per Lord Mansfield, C. J.), cited in *Jones* v. *Barkley* (1781) 2 Dougl., at p. 689.

Conditional promises

305. When a contract consists of reciprocal promises, and performance or some performance by one party is a condition precedent of performance by the other, the first named party is not entitled to performance by the other unless he has himself performed or tendered performance of his duty under the contract, or unless performance has been prevented or refused by the other party.

Pordage v. *Cole* (1669) 1 Wms. Saund. 319.
Peeters v. *Opie* (1672) 2 Wms. Saund. 350.
Hotham v. *East India Co.* (1787) 1 T. R. 638.
Morton v. *Lamb* (1797) 7 T. R. 125.
Stavers v. *Curling* (1836) 3 Scott, 740.
Roberts v. *Brett* (1856) 18 C. B. 561.
Christie v. *Borelly* (1860) 7 C. B. N. S. 561.

The order in which such promises are to be performed is determined by the Court, in view

of the language of the parties and the nature of the transaction.

Kingston v. *Preston* (1773), cited in *Jones* v. *Barkley* (1781) 2 Dougl., at p. 689.
Graves v. *Legg* (1854) 9 Exch., at p. 716; (1857) 2 H. & N. 210.
Roberts v. *Brett* (1856) 18 C. B. 561.

Part performance of conditions

306. When, in a contract falling within § 305, several acts or forbearances are promised on either or both sides, it is a question of construction for the Court whether part performance by one party entitles him to a corresponding part performance or to entire performance by the other, or whether complete performance on one side is a condition precedent of any performance on the other.

Neale v. *Ratcliff* (1850) 15 Q. B. 916.
Wilson v. *London Navigation Co.* (1865) L. R. 1 C. P. 61.

Waiver of condition

307. In a contract falling within § 305, a party who has, by accepting substantial part performance, waived the breach of a condition, cannot insist upon complete performance as a condition precedent of performance by himself; but he may claim compensation in respect of the non-performance.

White v. *Beeton* (1861) 7 H. & N., at p. 50.
Behn v. *Burness* (1863) 3 B. & S. 751.
Pust v. *Dowie* (1865) 5 B. & S. 37.
Sale of Goods Act, 1893, s. 11, subs. 1 (c).

TITLE V—EARNEST AND PENALTIES

Earnest

308. If, upon the making of a contract, something is given as earnest, this is evidence of the conclusion of the contract. It may also serve as a security that the contract shall be performed.

Langfort v. *Tiler's Admix.* (1704) 1 Salk. 113.
Ex parte Barrell (1875) L. R. 10 Ch. App., at p. 514.

Character of earnest

309. In the absence of agreement to the contrary, earnest is :

(*a*) to be returned or treated as part payment upon performance ;

(*b*) to be forfeited, if the party giving it fails to perform ;

(*c*) to be returned, if the party receiving it fails to perform.

Howe v. *Smith* (1884) 27 Ch. D. (C. A.), at pp. 101–102.

Deposit on purchase

310. In the absence of expression to the contrary, a deposit by a purchaser on a sale counts as earnest.

Soper v. *Arnold* (1889) L. R. 14 App. Ca., at p. 435.
Levy v. *Stogdon* [1898] 1 Ch. 478.

Earnest as damages

311. If a person who has received earnest money from another claims damages from that other for

breach of contract, the earnest is, in the absence of agreement to the contrary, to be taken into account in estimating the damages due to the claimant.

Howe v. *Smith* (1884) 27 Ch. D., at p. 105.

Penalty or liquidated damages

312. When the parties to a contract agree that a certain sum is to be paid in the event of breach by the party in default, the Court must decide, with reference to the intention of the parties to be gathered from the whole of the contract, whether the sum so agreed to be paid is to be regarded as a penalty or as liquidated damages (Book I § 117).

Davies v. *Penton* (1827) 6 B. & C. 216.
Sainter v. *Ferguson* (1849) 7 C. B. 619.
Law v. *Redditch Local Board* [1892] 1 Q. B., at p. 132.

Penalty not recoverable

313. If in the view of the Court the sum in question is a penalty, the injured party cannot recover more than the amount of the loss actually suffered by him.

Kemble v. *Farren* (1829) 6 Bing. 147.

Liquidated damages recoverable

314. If in the view of the Court the sum in question is liquidated damages, the injured party may recover such sum in full.

Kemble v. *Farren, ubi sup.*

Language immaterial

315. If the sum in question is in truth a penalty, it is immaterial that the parties have expressed it to be payable as liquidated damages; and if the sum in question is in truth liquidated damages, it is immaterial that the parties have expressed it to be a penalty.

Kemble v. *Farren*, (1829) 6 Bing. 147.
Sainter v. *Ferguson* (1849) 7 C. B. 619.
Sparrow v. *Paris* (1862) 7 H. & N. 599.
Parfitt v. *Chambre* (1872) L. R. 15 Eq. 36.
Clyde Bank Engineering Co. v. *Castaneda* [1905] A. C. 6.

Larger sum on failure to pay smaller

316. If a sum of money is agreed to be paid on failure to pay a smaller sum, the former sum is a penalty.

Astley v. *Weldon* (1801) 2 B. & P. 346.
Wallis v. *Smith* (1882) 21 Ch. D. 257.

[This principle probably extends to agreements to pay money on failure to perform any obligation for the breach of which damages can be readily assessed; e. g., to supply goods or render services of a kind readily obtainable in the open market. (*Sloman* v. *Walter* (1784) 1 Bro. C. C. 418; *Law* v. *Redditch Local Board* [1892] 1 Q. B. (C. A) 127.)]

Same provision for different breaches

317. If a contract contains several promises, of which any one is a promise to pay a certain sum of money, and a fixed sum is to be paid for the breach of any of them indifferently, this is a penalty.

Kemble v. *Farren* (1829) 6 Bing. 147.

318. If the value of the thing or things to be done is not readily ascertainable, and a specified sum is agreed to be paid in the event of breach, this sum may be recovered as liquidated damages. *Provision for promises of uncertain value*

Reynolds v. *Bridge* (1856) 6 E. & B., at p. 540.
Wallis v. *Smith* (1882) 21 Ch. D. 257.
Law v. *Redditch Local Board* [1892] 1 Q. B. 127.

[But if the things to be done under the contract comprise one or more matters of unascertained but trivial importance, and a large sum is to be paid in the event of any breach, *quære* whether this would not be treated by the Court as a penalty. (*Wallis* v. *Smith*, *ubi sup.*, at pp. 262–265.)]

319. If the parties have agreed for a penalty or liquidated damages to be paid in the event of breach, this agreement does not preclude the remedy of specific performance or injunction where such remedy is appropriate. But a plaintiff who has actually adopted the one remedy cannot afterwards avail himself of the other. *Provision does not include other remedies*

Howard v. *Hopkyns* (1742) 2 Atk. 371.
French v. *Macale* (1842) 2 Dr. & W., at p. 284.
Coles v. *Sims* (1854) 5 De G. M. & G 1.
Jones v. *Heavens* (1877) 4 Ch D. 636.
Howard v. *Woodward* (1864) 34 L. J. Ch. 47.
General Accident Assurance v. *Noel* [1902] 1 K. B. 377.

320. A contract whereby a man agrees to pay a sum of money or to do any other act on failure to do an illegal act (*quære*, or to omit a legal duty) is void. *Penalty inducing illegality*

Collins v. *Blantern* (1767) 2 Wils. 341.
Walrond v. *Walrond* (1858) 1 Johns. 18.

Penalty for non-performance of impossibility

321. A contract (not being a bond) to pay a penalty, or to do any other act, in the event of the non-performance of an act contrary to the course of nature or, by reason of facts known to both parties, impossible in law, is a mere voluntary promise (§§ 203, 212, 213). If the contract is expressed in the form of a bond, the provisions of Book I § 114, apply.

Co. Litt. 206 b.

Bond conditioned for performance or non-performance

322. Subject to Book I § 114, when a bond is conditioned to be void upon performance or non-performance by the obligor of a certain act or acts, it is construed as a contract by the obligor to perform or not to perform the act or acts, as the case may be.

Logan v. *Wienholt* (1833) 1 Cl. & F. 611.

SECTION IV

ASSIGNMENT OF CONTRACT

Contractual rights generally assignable

323. Subject to the provisions of §§ 324 and 325, any right arising out of a contract may be assigned.

Tolhurst v. *Associated Cement Manufactures* [1903] A. C., at p. 420.

Assignment of rights to sue for past breaches

324. A mere right to sue for unliquidated damages in respect of a breach of contract already committed is (probably) unassignable, except by operation of law.

May v. *Lane* (1894) 64 L. J. Q. B. 236.
Torkington v. *Magee* [1902] 2 K. B. at p. 433.
[But see *Weinberg* v. *Ogdens Ld.* (1905) XXII T. L. R. 58.]

Personal contracts

325. The benefit of a contract is not assignable, if the parties intended that the promisee alone should be entitled thereto. Such an intention is presumed, if the nature of the transaction involves personal confidence between the parties, or is otherwise such that personal considerations are of the essence of the contract.

Hole v. *Bradbury* (1879) 12 Ch. D. 886.
Griffith v. *Tower Publishing Co.* [1897] 1 Ch. 21.
Tolhurst v. *Associated Cement Manufacturers* [1902] 2 K. B. 660; [1903] A. C. 414.

Notice to promisor

326. An assignment of a right is not complete as against the debtor until he has notice thereof. If, before notice is communicated to him, he has *bonâ fide* discharged his liability to the assignor, he is not liable to the assignee.

Williams v. *Sorrell* (1799) 4 Ves. 389.
Stocks v. *Dobson* (1853) 4 De G. M. & G. 15.

Priorities

327. If there are more assignees than one, they are entitled, as against the debtor, according to priority of notice to him.

Marchant v. *Morton, Down, & Co.* [1901] 2 K. B. 829.

Consideration

328. A debtor may not decline performance to an assignee on the ground that there is no consideration for the assignment as between assignee and assignor.

Walker v. *Bradford Old Bank* (1884) 12 Q. B. D. 511.
Harding v. *Harding* (1886) 17 Q. B. D. 442.

Equities

329. The debtor may put forward against the assignee any defences which at the date of the notice were available to him against the assignor.

Mangles v. *Dixon* (1852) 3 H. L. C. 735.
Graham v. *Johnson* (1869) L. R. 8 Eq. 36.
Crouch v. *Credit Foncier* (1873) L. R. 8 Q. B. 380.
Roxburghe v. *Cox* (1881) 17 Ch. D. 520.

[Such defences may include claims against the assignor which, though not actually enforceable at the date of the notice, arise out of transactions entered into between the assignor and the debtor

before that date. But, to render these claims available as defences, there must either have been an agreement between the assignor and the debtor that mutual credit should be given in respect of such transactions, or the claims must have arisen out of the contract the benefit of which is assigned. (*Watson* v. *Mid-Wales Ry. Co.* (1867) L. R. 2 C. P. 593; *Christie* v. *Taunton* [1893] 2 Ch. 175; *Govt. of Newfoundland* v. *Newfoundland Ry. Co.* (1888) L. R. 13 App. Ca. 199.)]

330. A duty arising out of contract is unassignable. *Contractual duties not assignable*

Liversidge v. *Broadbent* (1859) 4 H. & N. 603.
Tolhurst v. *Associated Cement Manufacturers* [1902] 2 K. B. 660.

[The universality of this rule is unaffected by the judgment of the House of Lords in Tolhurst's case. Nor is it affected by the provisions of § 249 *supra*.]

331. The provisions of this Section do not apply to negotiable instruments. *Negotiable instruments*

SECTION V

DISCHARGE OF CONTRACT

Modes of discharge

332. A contract may be discharged in any of the following ways: —

(*a*) By performance; (§ 333).
(*b*) By agreement; (§§ 334–337).
(*c*) By condition subsequent; (§ 338).
(*d*) By breach of condition or renunciation; (§§ 339–343).
(*e*) By operation of law; (§§ 344–347).

Performance and tender

333. A contract is discharged by performance when each party has wholly performed his duty under it. Subject to § 239, tender is equivalent to performance.

Startup v. *Macdonald* (1843) 6 M. & G. 593.

Agreement

334. A contract may be discharged by a subsequent agreement of the parties that it shall no longer bind them, or by the substitution of a new contract.

King v. *Gillett* (1840) 7 M. & W. 55.
Foster v. *Dawber* (1851) 6 Exch., at p. 851.
Thornhill v. *Neats* (1860) 8 C. B. N. S. 831.
Scarf v. *Jardine* (1882) L. R. 7 App. Ca., at p. 351.

[Although the original contract was a specialty contract, performance of a simple contract, which professes to vary or discharge it, will be an answer to an action on the original contract. (*Nash* v. *Armstrong* (1861) 10 C. B. N. S. 259; *Steeds* v. *Steeds* (1889) 22 Q. B. D. 537.) But *quære* whether the second contract is effectual as a discharge without performance?]

Oral Agreement

335. Contracts falling within §§ 220 and 222 may be discharged by oral agreement; but a substituted agreement which is unenforceable because it fails to comply with the requirements of those §§ does not operate as a discharge of such a contract.

Goman v. *Salisbury* (1684) 1 Vern. 240.
Goss v. *Lord Nugent* (1833) 5 B. & Ad. 65.
Harvey v. *Grabham* (1836) 5 A. & E., at pp. 73–74.

Consideration

336. When a contract has been wholly performed on one side, an agreement by the continuing creditor to discharge the debtor from the performance due from him, is ineffectual, unless it is under seal or made for a consideration.

Foster v. *Dawber* (1851) 6 Exch. 839.
Williams v. *Stern* (1879) 5 Q. B. D. (C. A.) 409.

Negotiable instruments

337. The discharge of instruments governed by the Bills of Exchange Act 1882, is regulated by ss. 59, 62, 63 of that Act.

Condition subsequent

338. If it is an express or implied term in a contract that, in a certain event or after a certain time.

the contract shall be wholly or partly at an end, the contract is wholly or partly discharged accordingly, when such event happens or time has elapsed ("Condition subsequent").

Nowlan v. *Ablett* (1835) 2 C. M. & R. 54.
Head v. *Tattersall* (1871) L. R. 7 Ex. 7.
Geipel v. *Smith* (1872) L. R. 7 Q. B. 404.
Jackson v. *Union Marine Insurance Co.* (1874) L. R. 10 C. P. 148.

Existing rights

The determination of a contract by a condition subsequent does not affect any right already enforceable under the contract by either party.

Anglo-Egyptian Co. v. *Rennie* (1875) L. R. 10 C. P. 271.
Chandler v. *Webster* [1904] 1 K. B. (C. A.) 493.

Future of condition

339. When a contract consists of reciprocal promises, and performance or some performance by one party is a condition precedent of performance by the other (Book I § 110; Book II § 305), if the first named party without lawful excuse (*a*) either fails so to perform or (*b*) absolutely and unequivocally expresses an intention not to perform, or (*c*) disables himself from performing, his promise, the other party may at his option treat the contract as at an end, and the contract is thereupon discharged.

(*a*) *Mersey Steel Co.* v. *Naylor, Benson and Co.* (1884) L. R. 9 App. Ca., 434.
(*b*) *Freeth* v. *Burr* (1874) L. R. 9 C. P. 208.
Johnstone v. *Milling* (1886) 16 Q. B. D. 460.
(*c*) *Lovelock* v. *Franklyn* (1846) 8 Q. B. 371.
Synge v. *Synge* [1894] 1 Q. B. 466.

Renunciation

340. Even if performance by one party is not a condition precedent of performance by the other, either party may treat the contract as discharged if the acts and conduct of the other evince an intention to renounce it.

Freeth v. *Burr*, *ubi sup.*
Mersey Steel Co. v. *Naylor* (1884) L. R. 9 App. Ca., at p. 438.

Waiver of breach

341. If, in a case falling within §§ 339, 340, the injured party does not treat the contract as discharged, he continues liable to perform his part, and the other party may claim the benefit of any subsequently arising ground of discharge as an excuse for non-performance; but the injured party may claim damages for breach of contract.

Frost v. *Knight* (1872) L. R. 7 Ex. 114.
Johnstone v. *Milling* (1886) 16 Q. B. D. 460.
Avery v. *Bowden* (1855) 5 E. & B. 714.
Pust v. *Dowie* (1863) 32 L. J. Q. B. 179.

Character of stipulations

342. Whether a term in a contract is:

(*a*) a condition, the fulfilment or non-fulfilment of which will discharge the contract; or

(*b*) a promise, the breach of which may at the option of the injured party be treated as having that effect; or

(*c*) a promise, the breach of which merely gives rise to a claim for damages ("warranty"),

is a question to be decided by the Court on the construction of the contract.

Glaholm v. *Hays* (1841) 2 M. & G. 257.
Simpson v. *Crippin* (1872) L. R. 8 Q. B. 14.
Freeth v. *Burr* (1874) L. R. 9 C. P. 208.
Bettini v. *Gye* (1876) 1 Q. B. D. 183.
Mersey Steel & Iron Co. v. *Naylor* (1884) L. R. 9 App. Ca. 434.

Delay in performance

343. When in a contract a time is fixed for the performance of an act, and such time is not of the essence of the contract (Book I § 115), then, if there is delay in performance on the part of the promisor, the promisee has the right by notice to limit a reasonable time for performance, and, upon failure to perform within that time, to treat the contract as discharged.

What is a reasonable time is a question of fact in each case.

Taylor v. *Brown* (1839) 2 Beav. 180.
Parkin v. *Thorold* (1852) 16 Beav. 59.
Hatten v. *Russell* (1888) 38 Ch. D. 334.

Operation of law

344. A contract may be discharged by operation of law in any of the following ways: —

(*a*) By merger; (§ 345).
(*b*) By bankruptcy; (§ 346).
(*c*) By alteration of a written instrument. (§ 347).

Merger

345. An obligation arising out of a simple contract is discharged by merger, when an identical

obligation is created between the same parties by specialty.

Higgens' Case (1605) 6 Rep. 45 b.
Holmes v. *Bell* (1841) 3 M. & G. 213.
Bell v. *Banks* (1841) 3 M. & G. 258.
Owen v. *Homan* (1851) 3 Mac. & G. 378.
Price v. *Moulton* (1851) 20 L. J. C. P. 102.

Bankruptcy

346. The making of a receiving order in bankruptcy suspends the creditor's right to sue the debtor on a contract, and compels him to resort to the method of enforcement provided by the Bankruptcy Act, 1883. Except as to claims provided for by ss. 30 (subs. 1) and 37 (subs. 6) of that Act, the discharge of the bankrupt destroys the creditor's right of action against him.

Bankruptcy Act, 1883, s. 30 (2).

Alteration in written document

347. Any material alteration in a written contract intentionally made, without the consent of the promisor, by the promisee, or by any person while the instrument is in the possession of the promisee, not being an alteration made by mistake, discharges the promisor.

Pigot's Case (1614) 11 Rep. 27 b.
Wilkinson v. *Johnson* (1824) 3 B. & C. 428.
Davidson v. *Cooper* (1844) 13 M. & W. 343.
Aldous v. *Cornwell* (1868) L. R. 3 Q. B. 573.
Pattinson v. *Luckley* (1875) L. R. 10 Ex. 330.
Prince v. *The Oriental Bank* (1878) L. R. 3 App. Ca. 325.
Suffell v. *Bank of England* (1881) 7 Q. B. D. 270; 9 Q. B. D. (C. A.) 555.

[For a modification in the case of negotiable instruments, see Bills of Exchange Act, 1882, s. 64.]

SECTION VI

DISCHARGE OF RIGHTS OF ACTION ARISING FROM CONTRACT

Modes of discharge

348. Rights of action arising out of contract may be discharged in any of the following ways:

(*a*) By release; (§ 349)
(*b*) By accord and satisfaction; (§§ 350, 351)
(*c*) By payment in satisfaction; (§ 352)
(*d*) By judgment; (§ 353)
(*e*) By operation of the Statutes of Limitation. (§ 354)

Release

349. A document under seal, whereby a party entitled to sue foregoes his claim, discharges his right of action ("Release").

Barker v. *St. Quintin* (1844) 12 M. & W., at p. 453.
Harris v. *Goodwyn* (1841) 2 M. & G. 405.

Accord and satisfaction

350. A party entitled to sue another for breach of contract may agree with the party liable to accept some act in satisfaction of his claim. When such act has been performed, the agreement and per-

formance discharge the right of action ("Accord and Satisfaction").

Bayley v. *Homan* (1837) 3 Bing. N. C. 920.
Smith v. *Trowsdale* (1854) 3 E. & B. 83.
Day v. *McLea* (1889) 22 Q. B. D. (C. A.) 610.

Accord without satisfaction

351. Such an agreement not followed by performance does not operate as a discharge; but the making of a new promise may be accepted absolutely or conditionally as a satisfaction, if that was the intention of the parties, and then will absolutely or conditionally discharge the claim;

Sard v. *Rhodes* (1836) 1 M. & W. 153.
Evans v. *Powis* (1847) 1 Exch. 601.
Henderson v. *Stobart* (1850) 5 Exch. 99.
Hall v. *Flockton* (1851) 16 Q. B. 1039.
Gabriel v. *Dresser* (1855) 15 C. B. 622.

except that a promise by the party liable, not being a negotiable instrument, to pay the whole or a part of a liquidated debt, cannot be so accepted.

Bidder v. *Bridges* (1887) 37 Ch. D. (C. A.) 406.
Cumber v. *Wane* (1718) 1 Stra. 426.
McManus v. *Bark* (1870) L. R. 5 Ex. 65.
Foakes v. *Beer* (1884) L. R. 9 App. Ca. 605.

Payment

352. A right of action on a liquidated claim is discharged by payment, or by any act which is in law equivalent to payment ("Payment in Satisfaction").

Ash v. *Pouppeville* (1867) L. R. 3 Q. B. 86.
Tetley v. *Wanless* (1867) L. R. 2 Ex. 275 (Ex. Ch.).

Payment of lesser sum

The mere payment in coin of the realm of a lesser sum, in satisfaction of a debt accrued due, only discharges the debt *pro tanto*.

Foakes v. *Beer* (1884) L. R. 9 App. Ca. 605.
Underwood v. *Underwood* [1894] P. 204.

Judgment

353. A right of action arising from contract is discharged when judgment is recovered upon it in due course of law.

Owen v. *Homan* (1853) 3 Mac. & G. 407; 4 H. L. C. 997, 1037.
Kendall v. *Hamilton* (1879) L. R. 4 App. Ca. 504.
Commrs. of Stamps v. *Hope* [1891] A. C. 476.
Hammond v. *Schofield* [1891] 1 Q. B. 453.
McLeod v. *Power* [1898] 2 Ch. 295.

Lapse of time

354. A right of action arising out of a breach of contract may be discharged by the lapse of time (Bk. I Sect. V).

SECTION VII

CO-DEBTORS AND CO-CREDITORS

Co-promisor

355. When two or more persons contract as promisors in respect of the same performance, they may contract as:—

(*a*) joint; or

(*b*) several; or

(*c*) joint and several,

promisors.

Joint promisors

356. Persons contract as joint promisors when they unite in making one and the same promise.

White v. *Tyndall* (1888) L. R. 13 App. Ca. 263.

[e. g. "The said A and B do hereby for themselves, their executors administrators and assigns, covenant, promise, and agree."]

Several promisors

357. Persons contract as several promisors when they enter into independent promises for the same performance.

Ward v. *National Bank of New Zealand* (1883) L. R. 8 App. Ca. 755.

[e. g. "The said A and B, each for himself, his executors etc., do hereby covenant, promise, and agree."]

Joint and several promisors

358. Persons contract as joint and several promisors when they unite in making the same promise, and also enter into independent promises for the same performance.

Ex parte Harding (1879) 12 Ch. D. 557.
Burns v. *Bryan* (1887) L. R. 12 App. Ca. 184.

[e. g. "The said A and B for themselves do hereby covenant, and each of them for himself doth covenant."]

Liability of co-promisors

359. When two or more persons contract as promisors for the same performance (whether as joint promisors, or as several promisors, or as joint and several promisors) each of them is liable for the whole performance promised, unless the contrary appears from the terms of the contract.

Richards v. *Heather* (1817) 1 B. & Ald., at p. 35.
King v. *Hoare* (1844) 13 M. & W., at p. 505.
Tyser v. *The Shipowners' Syndicate* [1896] 1 Q. B. 135.

Discharge of co-promisors

360. If one co-promisor has fully performed the promise, or satisfied judgment thereon, the liability to the creditor of the other co-promisor or co-promisors is discharged.

King v. *Hoare* (1844) 13 M. & W. 494.
Beaumont v. *Greathead* (1846) 2 C. B., at p. 500.
Thorne v. *Smith* (1851) 10 C. B. 659.

Judgment against joint promisor

361. A judgment recovered against one joint promisor discharges the liability to the creditor of the other or others, even though the judgment

has not been satisfied; but this rule does not apply to several, nor to joint and several, promisors.

Kendall v. *Hamilton* (1879) L. R. 4 App. Ca. 504.

Release of joint promisor

362. A valid release of one joint, or joint and several promisor, discharges the liability of the other or others, unless the release expressly reserves the rights of the creditor against the other promisor or promisors.

North v. *Wakefield* (1849) 13 Q. B., at p. 541.
Mercantile Bank v. *Taylor* [1893] A. C. 317.
In re E. W. A. [1901] 2 K. B. 642.

Execution against co-promisors

363. When judgment has been obtained against co-promisors, execution may be levied upon any one of them for the whole amount of the judgment debt.

Bird v. *Randall* (1762) 1 Wm. Bl. 388.
Land Credit Co. v. *Fermoy* (1870) L. R. 5 Ch. App. 323.

Survival of joint liability

364. Except in the case of partners, the liability of one joint promisor survives on his death to the remaining promisor or promisors, and does not pass to his representatives. Upon the death of a last surviving joint promisor, his liability passes to his representatives.

Hill's Case (1875) L. R. 20 Eq. 585.
Re Hodgson (1885) 31 Ch. D. 177.
White v. *Tyndall* (1888) L. R. 13 App. Ca. 263.

Contribution

365. If one of joint promisors, or of joint and several promisors, has performed the promise, or suffered and satisfied judgment upon it, he is presumptively entitled to equal contribution from the other surviving co-promisor or co-promisors, and from the representatives of a deceased co-promisor.

Underhill v. *Horwood* (1804) 10 Ves., at p. 226.
Prior v. *Hembrow* (1841) 8 M. & W. 889.
Batard v. *Hawes* (1853) 2 E. & B. 287.
Ellesmere Brewery Co. v. *Cooper* [1896] 1 Q. B. 75.

Insolvency

366. If one joint, or joint and several, promisor is insolvent, the contribution due from the others is increased proportionately.

Hitchman v. *Stewart* (1855) 3 Dr. 271.
Lowe v. *Dixon* (1885) 16 Q. B. D. 455.
Ellesmere Brewery Co. v. *Cooper*, *ubi sup.*, at p. 80.

[The presumption of any or of equal contribution may be rebutted by circumstances, *e. g.* in the case of principal and surety.]

Co-promisees

367. When two or more persons contract as promisees in respect of the same performance they may contract as: —

(*a*) joint; or

(*b*) several,

promisees. They cannot contract as joint and several promisees.

Slingsby's Case (1588) 5 Rep. 18 b.
Eccleston v. *Clipsham* (1668) 1 Wms. Saund. 153.
Bradburne v. *Botfield* (1845) 14 M. & W. 573.

Whether they contract as joint promisees or as several promisees, is a question of construction for the Court in each case.

Keightley v. *Watson* (1849) 3 Ex., at p. 721.
White v. *Tyndall* (1888) L. R. 13 App. Ca. 263.

Enforcement by joint promisees

368. When several parties are joint promisees in respect of the same promise, they can only claim performance collectively from the promisor, and must all be parties to an action upon the promise.

Cabell v. *Vaughan* (1669) 1 Wms. Saund. 461 n. (1).
Jell v. *Douglas* (1821) 4 B. & Ald. 374.

[They need not all be joined as parties plaintiff. (*Luke* v. *South Kensington Hotel Co.* (1879) 11 Ch. D. 121; *Cullen* v. *Knowles* [1898] 2 Q. B. 380.)]

Survival of rights of joint promisee

369. If one joint promisee dies, his rights survive to the other or others, and, ultimately, to the representatives of the last survivor; but, in the case of joint loans, the survivor or survivors and the representatives of the last survivor are presumptively accountable to the representatives of a deceased joint promisee, in respect of his share.

Anderson v. *Martindale* (1801) 1 East, 497.
Re Jackson (1887) 34 Ch. D. 732.
Steeds v. *Steeds* (1889) 22 Q. B. D. 537.

Payment to one joint promisee

370. Payment to one joint promisee discharges the promisor's liability to the other or others.

Wallace v. *Kelsall* (1840) 7 M. & W. 264.
Powell v. *Brodhurst* [1901] 2 Ch., at p. 164.

[This is the Common Law rule; and there is nothing inconsistent with it in *Steeds* v. *Steeds* (22 Q.B.D. 537), which merely recognises the rule that, in case of doubt, equity presumes against a joint loan. If upon the true construction of the contract the creditors are found to be jointly interested, the Common Law rule still applies (per Farwell J., in *Powell* v. *Brodhurst* [1901] 2 Ch., at p. 164) unless (perhaps) the person to whom the money is paid is known by the debtor to be one of co-trustees.]

Release by one joint promisee

371. A release by one joint promisee discharges the promisor from his liability to the other or others, unless it was given in collusion with the debtor, and in fraud of the other promisees.

Wilkinson v. *Lindo* (1840) 7 M. & W. 81.
Bain v. *Cooper* (1842) 9 M. & W. 701.
Piercy v. *Fynney* (1871) L. R. 12 Eq. 69.

[Or, perhaps, unless the promisees are known to the debtor to be co-trustees.]

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